Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1997

GORDON McCANN,

Petitioner,

vs.

THE LARSON FOUNDATION, a non-profit corporation,

Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the State courts deny the Defendant Gordon McCann Procedural Due Process of Law by arbitrarily proceeding to hear the Defendant's Motion to Vacate Orders for Lack of Jurisdiction on October 6, 1997, when it was in fact noticed for hearing on November 3, 1997?

2. Did the lower courts err in failing to grant the Defendant's Motion to Vacate Orders for Lack of Jurisdiction?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

The opinion of the State Appellate Court appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was October 6, 1998. A copy of that decision appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, Section 1 of the Constitution of the United States of America.

Article II, Section 2 of the Constitution of the State of Illinois.

736 ILCS 5/9-102.

STATEMENT OF THE CASE

Defendant Gordon McCann believes that the lower State courts erred by dismissing his Motion to Vacate. Specifically, the Defendant argues that (1) the Plaintiff's improper notice to this Defendant violated Defendant's Procedural Due Process rights and the provisions of the Illinois Forcible Entry and Detainer Act pursuant to 735 ILCS 5/9-102, 104.1 (West 1996); thus, the lower courts had no jurisdiction to enter and affirm judgment on Plaintiff's original complaint; and (2) the Defendant had previously exercised his contractual rights to purchase the premises by tendering the Plaintiff money.

REASONS FOR GRANTING THE PETITION

I. ALL LOWER STATE COURTS ERRED IN DISMISSING THE DEFENDANT'S MOTION TO VACATE ORDERS FOR LACK OF JURISDICTION WITHOUT HEARING EVIDENCE OR ARGUMENTS ON THE SAME ON OCTOBER 6, 1997, WHEN DEFENDANT'S MOTION WAS NOTICED AND SET FOR HEARING ON NOVEMBER 3, 1997. DEFENDANT WAS DENIED DUE PROCESS OF LAW AND WAS TREATED UNFAIRLY.

A. All State Courts Denied The Defendant Procedural Due Process Of Law By Proceeding To Hear Defendant's Motion To Vacate Orders For Lack Of Jurisdiction On October 6, 1997, When It Was Noticed For Hearing For November 3, 1997. The Appellate Court Erred In Affirming This Type Of Conduct.

The Defendant's Motion to Vacate Orders for Lack of Jurisdiction was duly noticed for hearing on November 3, 1997 (C-82 thru C-83); however, on October 6, 1997, for some unexplained reason, and over the objections of both attorneys, the trial court proceeded to hear, without such technical niceties as proper notice, due process, proper evidence, and proper argument, the merits

of Defendant's Motion to Vacate Orders for Lack of Jurisdiction and summarily denied the same (C-4B). The due process clause of both the Federal and State Constitutions guarantee all litigants procedural due process of law, and procedural due process of law requires that there be an orderly consideration of Motions which seek to challenge the validity of a pleading. See ILP, Constitutional Law, Section 498.

Likewise, procedural due process requires the notice to be given to a litigant before his property rights may be divested by a Judgment of a Court. See ILP, Constitutional Law, Section 497. Also see *Gorin v. McFarland,* 80 Ill.App.2d 398, 224 N.E.2d 615 (1967); *Hyon Waste Management, Etc. v. City of Chicago,* 53 Ill.App.3d 1013, 369 N.E.2d 179, 11 Ill.Dec. 725 (1977); *Pettigrew v. National Accounts System, Inc.,* 213 N.E.2d 778 (1966); *Durkin v. Hey,* 376 Ill. 292, 33 N.E.2d 463 (1941); and *In Re Hoffman,* 49 Ill.App.2d 436, 200 N.E.2d 37 (1964).

In *People v. Niesmann,* 356 Ill. 322, 190 N.E. 670 (1934), the Supreme Court of Illinois succinctly set forth the essential requirements of procedural due process of law by stating:

> The guaranty of due process of law requires that every man shall have the protection of his day in court and the benefit of the general

> law, - a law which hears before it condemns which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. *Truax v. Corrigan,* 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 A. L. R. 375; *Simon v. Craft,* 182 U. S. 427, 21 S. Ct. 836, 45 L. Ed. 1165; *Hurtado v. California,* 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232; *Ex parte Wall,* 107 U. S. 265, 2 S. Ct. 569, 27 L. Ed. 552. An orderly proceeding in which a person is served with notice, actual or constructive, and has an opportunity to be heard and to protect and enforce his rights before a court having power to hear and determine the cause, is due process of law. *City of Chicago v. Cohn,* 326 Ill. 372, 158 N. E. 118, 55 A. L. R. 196; *People v. Cohen,* 219 Ill. 200, 76 N.E. 388.

The aforegoing authorities stand for the important proposition of law that procedural due process requires that there be proper notice to a person so that he has an opportunity to be heard and defend his position in an orderly procedure. This was not done in the instant case since the trial court proceeded on its own over the objections of counsel on October 6, 1997, to hear and dismiss the Defendant's Motion to Vacate Orders for Lack of Jurisdiction without hearing any evidence on October 6, 1997, instead of hearing the matter on its merits on November 3, 1997, as noticed and contemplated by all litigants. The Defendant was thus denied an opportunity to offer evidence and be

completely heard on his Motion to Vacate Orders for Lack of Jurisdiction, and there was a complete denial of his procedural rights as guaranteed to him by Amendment XIV, Section 1 of the Constitution of the United States of America and Article II, Section 2 of the Constitution of the State of Illinois.

B. The Defendant's Motion To Vacate Orders For Lack Of Jurisdiction Should Have Been Granted And Allowed By The Trial Court.

The Defendant's verified Motion to Vacate Orders for Lack of Jurisdiction contained sufficient facts and legal citations, which if properly considered by the trial court, would have been granted and allowed. The Defendant's Motion states that the Defendant did exercise his option to purchase by mailing First of America official checks totaling the sum of $5,000.00 to the Plaintiff (C-76). The Defendant also telephoned the Plaintiff's agent and employee, Kip Hay, who accepted the Defendant's exercise of said option and who promised the Defendant that a Warranty Deed would be forthcoming (C-63 thru C-64).

Subsequent thereto, the Plaintiff breached the option to purchase and refused to convey title to the Defendant as promised (C-64). Thereafter, the Plaintiff served notice upon the Defendant (C-7 thru C-81), but these notices were defective and in violation of 735 ILCS 5/9-104.1 and 735 ILCS 5/9-102 and the cases decided thereunder (C-65). See *Eppers v. First Nat. Bank of Lake Forest,* 151 Ill.App.3d 902, 503 N.E.2d 589, 104 Ill.Dec. 874 (Ill.App. 2 Dist. 1987); *Nance v. Bell,* 210 Ill.App.3d 97, 568 N.E.2d 974, 154 Ill.Dec. 753 (Ill.App. 2 Dist. 1991); *Eddy v. Kerr,* 96 Ill.App.3d 680, 422 N.E.2d 176, 52 Ill.Dec. 495 (1981); *Vogel v. Dawdy,* 123 Ill.App.3d 356, 462 N.E.2d 804, 78 Ill.Dec. 685 (Ill.App. 4 Dist. 1984); *Benjamin v. Allison,* 201 Ill.App. 34 (1915); and *French v. Willer,* 126 Ill. 611 (1888).

The aforegoing statutes and cases require that proper written notice be served upon the Defendant as a condition precedent to filing a Complaint in Forcible Entry and Detainer, and because of the Plaintiff's failure to properly do this, there was a complete lack of jurisdiction on the trial court to enter any Orders against the Defendant. Since the trial court lacked jurisdiction in the instant cause of action all purported Orders entered are null and void for lack of jurisdiction and must be vacated immediately.

II. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S MOTION TO VACATE ORDERS FOR LACK OF JURISDICTION. THE APPELLATE COURT ERRED IN AFFIRMING SINCE LACK OF JURISDICTION MAY BE RAISED ANY TIME.

The Plaintiff filed a Motion to Dismiss on behalf of Defendant's alleged lack of due diligence in filing his Motion to Vacate Orders for Lack of Jurisdiction (C-84 thru C-85). The trial court granted Plaintiff's Motion to Dismiss (C-4B). The Appellate Court erred since the Illinois decisions consistently hold that lack of jurisdiction is an issue which can be raised at any time, and is not restricted by either time limitations or requirements of due diligence. See *Home State Sav. Ass'n. v. Powell,* 73 Ill.App.3d 915, 392 N.E.2d 598, 29 Ill.Dec. 901 (1979); *Ligon v. Williams,* 264 Ill.App.3d 701, 637 N.E.2d 633, 202 Ill.Dec. 94 (App. 1 Dist. 1994); *Borcherding v. Anderson Remodeling Co., Inc.,* 253 Ill.App.3d 655, 624 N.E.2d 887, 191 Ill.Dec. 699, appeal denied 198 Ill.Dec. 540, 155 Ill.2d 561, 633 N.E.2d 2 (App. 2 Dist. 1993); and *People v. Reymar Clinic Pharmacy, Inc.,* 246 Ill.App.3d 835, 617 N.E.2d 35, 186 Ill.Dec. 796 (App. 1 Dist. 1993).

Given this overwhelming weight of legal authority, the trial court should have denied the

Plaintiff's Motion to Dismiss and should have proceeded to a hearing on the merits of Defendant's Motion to Vacate Orders for Lack of Jurisdiction on November 3, 1997, as per notice. This, of course, was not done, and Defendant's procedural and substantive legal rights were violated by the trial court. The Appellate Court's decision in affirming the trial court's order was clearly erroneous based upon the overwhelming legal authorities cited in Defendant's Brief.

Technical niceties such as proper notice, proper evidence, and procedural due process of law should never be ignored by any legal tribunal in our society. The State Courts must be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: December 30, 1998

Respectfully submitted,

by: Gordon McCann

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APPENDIX A

Exhibit A--Illinois Supreme Court Order

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701

85683

October 6, 1998

Mr. Jack C. Vieley
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Peoria, IL 61602-1144

No. 85683 – The Larson Foundation, etc., respondent, v. Gordon McCann, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 28, 1998.

Exhibit B—Illinois Appellate Court Opinion

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

NO. 4-97-1004

FILED
MAY 12 1998
Clerk of the
Appellate Court, 4th Dist.

THE LARSON FOUNDATION, a
non-profit corporation,
Plaintiff-Appellee,

v.

GORDON MCCANN,
Defendant-Appellant.

Appeal from Circuit Court of
Logan County
No. 96LM60

Honorable David L. Coogan, Judge Presiding.

ORDER

In June 1996, the trial court entered judgment for plaintiff, the Larson Foundation, on its complaint for forcible entry and detainer against defendant, Gordon McCann. In August 1997, defendant filed a motion to vacate that judgment on the ground that the court lacked jurisdiction to enter it. In September 1997, plaintiff filed a motion to dismiss defendant's motion to vacate, asserting that it was really a section 2-1401 motion (735 ILCS 5/2-1401 (West 1996)) and that it failed to show a meritorious defense and due diligence. In October 1997, the court conducted a hearing on plaintiff's motion to dismiss and later entered a written order granting it.

Defendant appeals, arguing that the trial court erred by dismissing his motion to vacate. We affirm.

I. BACKGROUND

In June 1996, plaintiff filed a complaint against defendant for forcible entry and detainer and for rent due on a real estate lease. Later that month, the trial court entered judgment for plaintiff and an order for possession. In July 1996, defendant appealed. Plaintiff filed a motion to dismiss the appeal, which this court allowed in January 1997. In February 1997, the trial court

granted plaintiff's petition for assistance to restore possession of the real estate to plaintiff.

In August 1997, defendant filed the motion to vacate, pursuant to section 2-1401 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 1996)), and noticed the motion for hearing in November 1997. In September 1997, plaintiff filed a motion to dismiss, pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 1996)), claiming defendant failed to plead facts sufficient to show a meritorious defense and due diligence. In October 1997, the trial court conducted a hearing on plaintiff's motion to dismiss and subsequently entered a written order granting it.

II. ANALYSIS

Defendant argues that the trial court erred by dismissing his motion to vacate. Specifically, he contends that (1) plaintiff's improper notice to defendant violated defendant's due process rights and the provisions of the Forcible Entry and Detainer Act (Act) (735 ILCS 5/9-102, 104.1 (West 1996)); thus, the court had no jurisdiction to enter judgment on plaintiff's original complaint; and (2) defendant had exercised his contractual right to purchase.

A section 2-1401 motion to vacate judgment (735 ILCS 5/2-1401 (West 1996)) may be challenged by a motion to dismiss under section 2-615 of the Code (735 ILCS 5/2-615 (West 1996)) if the section 2-1401 motion fails to state a cause of action or if, on its face, it shows that petitioner is not entitled to relief. *Klein v. La Salle National Bank,* 155 Ill. 2d 201, 204, 613 N.E.2d 737, 739 (1993). A section 2-615 motion to dismiss for failure to state a cause of action challenges only the legal sufficiency of a complaint and admits all well-pleaded facts. *Koffski v. Village of North Barrington,* 241 Ill. App. 3d 479, 485, 609 N.E.2d 364, 369 (1993). It is directed toward defects that appear on the face of the pleading, and does not raise affirmative factual defenses. The question a section 2-1401 motion presents is whether it contains sufficient facts which, if proved, would entitle the movant to relief. *Storcz v. O'Donnell,* 256 Ill. App. 3d 1064, 1069, 628 N.E.2d 677, 680-81 (1993).

Defendant's motion to vacate alleged that (1) plaintiff failed to give defendant proper written notice prior to filing suit for forcible entry and detainer; thus, the trial court had no jurisdiction to enter an order in that suit; and (2) in September 1994, defendant had exercised his option to purchase as set forth in the lease by mailing plaintiff checks totaling $5,000 and by telephoning plaintiff's agent, Kip Hay, who accepted defendant's exercise of the option.

A. Alleged Lack of Jurisdiction

In his motion to vacate, defendant alleged that the trial court had no jurisdiction to enter an order on plaintiff's original suit for forcible entry and detainer. Specifically, he alleged as follows:

> "[P]roper service of the written notices required pursuant to 735 ILCS 5/9-104.1 and 735 ILCS 5/9-102 [(West 1996)] are conditions precedent as a matter of law which must be met prior to filing suit in the instant cause of action. The [p]laintiff[']s failure to follow the law in this case results in a lack of jurisdiction to the trial court in the instant cause of action."

Section 9-102 of the Act provides, in part, that a seller may institute an action for forcible entry and a detainer only after (1) the potential buyer has failed to comply with the purchase agreement; and (2) the seller has made a written demand upon the buyer for the property. 735 ILCS 5/9-102(a)(6) (West 1996). Section 9-104.1 of the Act provides that (1) the seller must serve the demand personally or by certified mail with return receipt requested; and (2) the buyer has 30 days within which to cure the default.

Defendant fails to allege any facts to support his claim; his allegation that the service of notice was improper is merely a conclusory statement of law. Moreover, his motion is internally inconsistent regarding this claim. In another allegation, defendant stated that plaintiff served him a notice of default by certified mail in February 1996. Plaintiff filed the original suit in June 1996 and the trial court entered an order later that month. Thus, neither the method of service (certified mail) nor the interim between the notice and the suit (more than 30 days) were improper. Because defendant provides no facts that, if proved, would entitle him to relief on the basis of the trial court's lack of jurisdiction, we conclude that the court did not err.

B. Section 2-1401 Requirements

To be entitled to relief under section 2-1401 of the Code, defendant's motion must (1) set forth a meritorious defense to the original action; and (2) demonstrate that he has exercised due diligence (a) in presenting the defense or claim to the trial court in the original action, and (b) in petitioning the court for relief. *Klein,* 155 Ill. 2d at 205, 613 N.E.2d at 739.

In this case, defendant's motion failed to allege *any* facts showing he had exercised due diligence in presenting defenses to the trial court in

the original action or in petitioning the court for relief. Defendant contends he need not allege due diligence because he is challenging the court's jurisdiction. See *Klein,* 155 Ill. 2d at 206, 613 N.E.2d at 739. Because we have rejected his contention that the court had no jurisdiction, he must comply with all the requirements for relief under section 2-1401.

In addition, defendant's motion failed to set forth a meritorious defense. His allegation that he gave oral notice (by telephone to Kip Hay) that he was exercising his option to purchase does *not* set forth a *meritorious* defense because the lease and option to purchase provides that defendant must notify plaintiff *in writing by certified mail* that he was exercising the option to purchase. Thus, defendant failed to allege facts to support his section 2-1401 motion.

A reviewing court will not disturb the trial court's judgment on appeal from disposition of a motion for section 2-1401 relief absent an abuse of discretion. *Klein,* 155 Ill. 2d at 206, 613 N.E.2d at 739. Based on this record, we cannot say that the court abused its discretion in granting plaintiff's motion to dismiss.

In passing, we note that defendant contended the trial court violated his due process rights

because at the October 1997 hearing on plaintiff's motion, the court also considered defendant's motion to vacate, rather than waiting until November 1997 for the previously scheduled hearing. As a result, defendant claims he was unable to present any evidence. Discussion regarding defendant's motion to vacate is a necessary part of the hearing on the motion to dismiss that motion. However, all well-pleaded facts are admitted for purposes of a motion to dismiss; thus, the court did not need to hear evidence. *Klein,* 155 Ill. 2d at 204, 613 N.E.2d at 739. Accordingly, the trial court did not violate defendant's due process rights.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment.

Affirmed.

STEIGMANN, *J.,* with GARMAN, *P.J.,* and KNECHT, *J.,* concurring.